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In the Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

OLIVIA RUX, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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Sudan showed in its Petition ("Pet.") that this Court should grant certiorari to review and correct the ruling of the court below that permits a plaintiff to invoke subject matter jurisdiction under 28 U.S.C. § 1605(a)(7), the terrorism exception of the FSIA,[1] without showing the causal connection that the statute makes prerequisite to jurisdiction. In their Opposition ("Opp."), Plaintiffs fail to effectively refute either the error of the Fourth Circuit's ruling or the need for review of that ruling by this Court.

I. Fed. R. Civ. P. 8(a)(1) Does Not Excuse Plaintiffs from Alleging the Facts upon Which Subject Matter Jurisdiction Is Based, but Instead Incorporates the Requirement That They Do So.

Plaintiffs err in arguing (Opp. 7-9) that the allegations of their Complaint are sufficient unless the Court applies a "heightened pleading standard." It is the plaintiff's burden to allege the facts which (if accepted as true) are adequate to support subject matter jurisdiction. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Fed. R. Civ. P. 8(a)(1) does not excuse Plaintiffs from this obligation. On the contrary, Plaintiffs' failure to allege the requisite facts means that Plaintiffs have not complied with Fed. R. Civ. P. 8(a)(1)'s requirement that their pleading must set forth "a short and plain statement of the grounds upon which the court's jurisdiction depends."[2]

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[1] Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602-1611.

[2] Plaintiffs' heavy reliance upon *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), is misplaced. The issue of subject matter jurisdiction was not involved in *Leatherman*. *Leatherman* involved Fed. R. Civ. P. 8(a)(2), which requires "a short and plain statement of the claim." In *Leatherman*, this Court held that under

This Court has often applied the requirement that the plaintiff must plead the specific facts upon which the court's jurisdiction depends without suggesting that Fed. R. Civ. P. 8(a)(1) negates the plaintiff's duty to do so. Thus, for example, addressing the jurisdictional issue of standing, this Court has held:

> it is the burden of the "party who seeks the exercise of jurisdiction in his favor," *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Warth v. Seldin*, 422 U.S. 490, 518 (1975). Thus, petitioners in this case must "allege . . . facts essential to show jurisdiction. If [they] fai[l] to make the necessary allegations, [they have] no standing." *McNutt, supra*, 298 U.S., at 189.

FW/PBS, Inc. v. City of Dallas, 493 U.S. at 231; *see also United States v. Hays*, 515 U.S. 737, 743 (1995). To show jurisdictional standing the plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. at 508 (footnote omitted).

Similarly, as Sudan pointed out (Pet. 13), a plaintiff invoking a federal court's diversity jurisdiction must allege the specific facts that support it. The plaintiff must allege not only that the parties are citizens of different states, but must also

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Fed. R. Civ. P. 8(a)(2) no "heightened pleading standard" applied to plaintiffs' statement of their claim against the defendant municipality. *Leatherman* does not address the requirement at issue in this case — i.e., that plaintiff's complaint must allege the facts that support the subject matter jurisdiction plaintiff invokes.

allege the specific states of which the parties are citizens. The obligation of pleading the specific facts that support diversity jurisdiction is not excused by Fed. R. Civ. P. 8(a)(1) — it is required by it. As stated in *McCready v. eBay, Inc.*, 453 F.3d 882, 890-891 (7th Cir. 2006) (citations omitted):

> Rule 8(a)(1) only requires "a short and plain statement" of the jurisdictional basis, which, however "must be alleged affirmatively and distinctly and cannot be established 'argumentatively or by mere inference.'" "For a case to be within the diversity jurisdiction of the federal courts, diversity must be 'complete,' meaning that no plaintiff may be a citizen of the same state as any defendant." McCready's complaint does not mention eBay's principal place of business; therefore he did not allege complete diversity.

Plaintiffs' arguments against the imposition of a "heightened pleading standard" and a requirement of pleading with "particularity" are straw-man arguments. As noted, Fed. R. Civ. P. 8(a)(1) requires "a short and plain statement of the ground upon which the court's jurisdiction depends." This simplified form of pleading does not excuse the plaintiff from the duty to allege the facts that support subject matter jurisdiction, nor does it permit a plaintiff to invoke the jurisdiction of the court on the basis of allegations that go only half way to meeting the prerequisites for jurisdiction. What is required is "a short and plain statement" of the allegations that support subject matter jurisdiction. Indeed, Plaintiffs' purported jurisdictional allegations (Pet. App. 8a-11a) are not short or plain at all. Plaintiffs' Complaint sets out numerous conclusory assertions and suggestive allegations, but omits any plain allegation of fact that would show a causal connection

between any alleged material support provided by Sudan and the *USS Cole* bombing.

As shown by the decisions cited above, the courts have held that a plaintiff *is* required to allege the specific facts that support subject matter jurisdiction. Indeed, the Plaintiffs here are attacking a principle that the Fourth Circuit itself correctly adopted. The court recognized that it was Plaintiffs' obligation to plead the facts that support subject matter jurisdiction. The court stated:

> *Plaintiffs must establish jurisdictional causation by alleging facts* sufficient to establish a reasonable connection between a country's provision of material support to a terrorist organization and the damage arising out of a terrorist attack.

Pet. App. 20a (emphasis added). The Fourth Circuit correctly held Plaintiffs were required to allege the facts establishing jurisdiction. The court's error was in applying its "reasonable connection" legal standard to test the sufficiency of Plaintiffs' allegations rather than the "caused by" requirement of the statute. *See* Pet. 6-15.

II. It Is Plaintiffs, Not Sudan, Who Ignore The Plain Requirements Of § 1605(a)(7).

Contrary to Plaintiffs' argument (Opp. 12-13), Sudan's position is not based upon a proposal to add any extra-statutory requirement. Section 1605(a)(7) confers subject matter jurisdiction only when the injury is "caused by" material support provided by the defendant state. It is this express requirement of the statute that the Fourth Circuit failed to apply to the allegations of Plaintiffs' Complaint.

III. There Is No Valid Basis For Penalizing Sudan Because It Exercised Its Right To Seek Dismissal On The Pleadings.

Plaintiffs err in arguing (Opp. 13-16) that Sudan somehow forfeited its rights by its "strategic decision" to seek dismissal on the pleadings rather than challenging the truth of Plaintiffs' allegations. As *Phoenix Consulting, Inc. v. Republic of Angola,* 216 F.3d 36, 39-40 (D.C. Cir. 2000), makes clear, a sovereign defendant has two routes it may follow to seek an initial determination of sovereign immunity: it may seek dismissal based upon the inadequacy of the allegations of the plaintiff's complaint or it may controvert the facts alleged. There is no penalty or adverse inference that arises if the defendant proceeds by way of a motion to dismiss on the pleadings rather than contesting the truth of the facts alleged.

"In order to preserve the full scope of [sovereign] immunity, the district court must make the 'critical preliminary determination' of its own jurisdiction as early in the litigation as possible; to defer the question is to 'frustrate the significance and benefit of entitlement to immunity from suit.'" *Phoenix Consulting, Inc. v. Republic of Angola,* 216 F.3d at 39 (citing *Foremost-McKesson, Inc. v. Islamic Republic of Iran,* 905 F.2d 438, 449 (D.C. Cir. 1990)). An unwarranted breach of sovereign immunity cannot be effectively remedied later in the proceedings because an important element of sovereign immunity is the right to immunity from the litigation itself, including discovery. *See Foremost-McKesson,* 905 F.2d at 443. The Fourth Circuit's test violates this principle because it allows the plaintiff to force the foreign sovereign into litigation by alleging only a "reasonable connection" rather than the causal connection required by the statute.

For example, the Plaintiffs' allegation that Sudan permitted Al Qaeda to ship explosives to Yemen was held adequate

presumably because "explosives" and "Yemen" are deemed to be "reasonably connected" to the *USS Cole* bombing. Yet there is no allegation to show any causal connection — no allegation to show that the explosives allegedly shipped were used in, or had any connection at all with, the *USS Cole* bombing. Moreover, there is no allegation even to show that the alleged shipment occurred anywhere near the date of the bombing.

The effect of Plaintiffs' theory — and of the Fourth Circuit's rule — is that a plaintiff may obtain access to the considerable discovery powers found in the Federal Rules of Civil Procedure on the basis of allegations that, although suggestive, do not meet the statutory jurisdictional requirements. For example, a plaintiff might have information that Sudan permitted explosives to be shipped to Yemen, but that the reported shipment occurred several years before the *USS Cole* bombing. By omitting the date, the plaintiff could allege only the shipment of explosives to Yemen and could thereby satisfy the Fourth Circuit's "reasonable connection" test and obtain the right to conduct its investigation of the foreign sovereign through discovery. However, if the plaintiff had been required to plead facts that actually supported causation, it would have been immediately apparent that further allegations were needed to show the alleged shipment had a role in causing the *USS Cole* bombing.

Plaintiffs' lengthy effort to distinguish *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528 (5th Cir. 1992), is unsuccessful. Opp. 14-16 and n. 4. As Sudan pointed out (Pet. 17), *Arriba* correctly held that a plaintiff is not permitted to use discovery to find the factual support for subject matter jurisdiction that it cannot allege. That is precisely the exercise

that Plaintiffs seek to conduct here, in violation of one of the basic elements of sovereign immunity.[3]

IV. The Decision Below Is In Conflict With The Decisions Of This Court And Lower Courts.

Sudan has shown (Pet. 6-15) that the decision below is in conflict with the applicable statute and court decisions. Plaintiffs err in arguing that there is no conflict because no decision requires a plaintiff to plead "more than what is pled here." Opp. 17. On the contrary, the pertinent decisions show that Plaintiffs are not excused from alleging facts that actually show jurisdiction on the ground that they cannot be required to be "detailed" or "particular" in their pleading. *Id.*

For example, Plaintiffs' first case, *Price v. Socialist People's Libyan Arab Jamahiriya,* 294 F.3d 82 (D.C. Cir. 2002), supports Sudan's position, not Plaintiffs'. Plaintiffs rely upon the *Price* court's observation that a plaintiff "need not set out all of the precise facts on which the claim is based in order to survive a motion to dismiss." Opp. 17 (quoting *Price*, 294 F.3d at 93). However, the *Price* decision itself shows that, even if not "all of the precise facts" are required, a plaintiff must nonetheless allege the basic facts that are prerequisite to subject matter jurisdiction. *Price* held that the plaintiffs' pleading in that case, which included allegations that plaintiffs had been kicked, clubbed and beaten by Libyan agents, was insufficient because "the facts pleaded do not reasonably support a finding that the physical abuse allegedly inflicted by Libya evinced the degree of cruelty necessary to reach a level

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[3] "The infliction of those burdens [of litigation] may compromise [sovereign immunity] just as clearly as would an ultimate determination of liability." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998).

of torture." The court observed that, "Plaintiffs seemingly have left it for the courts to conjure some illicit purpose to fill in this pleading gap. Obviously, this will not do." *Id.*, at 93-94.

In a like manner, the Plaintiffs in this case have left it to the courts to fill in the gaps in their pleading. Plaintiffs allege that Sudan permitted the shipment of explosives to Yemen, but they leave it to the courts to fill in the gap that would show the explosives had some causal connection with the bombing of the *USS Cole*. *Price* refutes Plaintiffs' argument because *Price* did require that the plaintiffs in that case allege facts that actually met the requirements of the statute.

Also, as Sudan showed (Pet. 13-14), *Robinson v. Gov't of Malaysia*, 269 F.3d 133 (2d Cir. 2001), required allegations of the specific elements of negligence that would support liability in order to sustain a lawsuit under the FSIA tort exception, 28 U.S.C. § 1605(a)(5). The court held that failure to require a factual predicate for such jurisdiction would invite plaintiffs "to circumvent the jurisdictional hurdle of the FSIA," a result "at odds with the goal of the FSIA to enable a foreign government to obtain an early dismissal when the substance of the claim against it does not support jurisdiction." 269 F.3d at 146. Plaintiffs fail in their attempt (Opp. 20) to distinguish *Robinson* on the ground that it was ruling on plaintiff's proof rather than the allegations of his complaint. The *Robinson* court was explicit on this point — it held that "the allegations in the complaint, taken as true, do not allege a 'tortuous act or omission' required to sustain jurisdiction under the FSIA." *Id.* at 144. *Robinson* holds unambiguously that the plaintiff must allege the specific facts that support subject matter jurisdiction in an FSIA case, and this holding is in conflict with the decision below.

Plaintiffs' reliance (Opp. 18) upon *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C. Cir.

2004), is also misplaced. *Kilburn* did not reject the requirement that a plaintiff must plead facts that show causation in support of a § 1605(a)(7) claim. *Kilburn* stated that, as money is fungible, financial support provided by the defendant state need not be "*directly* traceable" to the terrorist act in question. 376 F.3d at 1130 (emphasis by the court). However, the *Kilburn* court did not purport to eliminate the requirement of a causal link between the financial support and the terrorist act. Indeed, tracing was not an issue in *Kilburn* because Libya had specifically funded and directed the terrorist act. *Id.* Nothing in *Kilburn's* holding absolves Plaintiffs in this case of their duty to plead the facts that show the requisite causal link.

Plaintiffs also fail in their efforts (Opp. 19-21) to distinguish the decisions of this Court upon which Sudan relies. *Papasan v. Allain,* 478 U.S. 265, 286 (1986), holds that a plaintiff must allege the "actual facts" that constitute the basis for its claim and thus refutes Plaintiffs' theory that they need only put Sudan on notice of the nature of their assertion of jurisdiction. Similarly the decision below violates the principle of *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83 (1998), because it would permit the court below to proceed as if it had subject matter jurisdiction based on allegations that go no further than part of the way towards satisfying the statutory jurisdictional requirements. Plaintiffs gain nothing by citing *Steel Co.'s* description of causation as "a fairly traceable connection" between the injury and the complained-of conduct. 523 U.S. at 102-103. Plaintiffs in this case have alleged no facts that support such a connection. For example, there is no attempt to trace a connection between the alleged shipment of explosives and the *USS Cole* bombing.

V. Post-appeal Proceedings In The Trial Court Cannot Cure The Trial Court's Lack Of Jurisdiction To Conduct Those Proceedings.

Sudan is entitled to dismissal of Plaintiffs' Complaint for lack of subject matter jurisdiction. As a result, the court below has no jurisdiction to proceed at all in the case.[4] Plaintiffs cannot bootstrap themselves into jurisdiction by means of inferences drawn from the Federal Rules that have no applicability unless jurisdiction exists. Accordingly, Plaintiffs err in arguing (Opp. 21-23) that the inferences they claim should be drawn from post-appeal trial court proceedings can cure the omissions that required dismissal of Plaintiffs' Complaint.

Moreover, "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d at 443 (quoting *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir. 1989)). Plaintiffs' theory would subject the foreign sovereign to the burdens of litigation notwithstanding its entitlement to dismissal on the pleadings because its right to dismissal would become subject to the subsequent litigation.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

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[4] "Without jurisdiction, the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, *supra*, at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

Respectfully submitted,

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